In The

Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
A Nebraska Corporation,

Petitioner,

vs.

GERALDINE KROGER, Administratrix of the
Estate of JAMES D. KROGER, Deceased,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Nebraska overruling the defendant's (petitioner's) Motion to Dismiss for Lack of Subject Matter Jurisdiction is unreported, but appears in the Appendix (A. 54).

The memorandum opinion of the United States District Court for the District of Nebraska overruling defendant's Motion for New Trial or in the Alternative

Judgment Notwithstanding the Verdict is unreported, but appears in the Appendix (A. 60).

The opinion of the Court of Appeals is reported at 558 Fed. 2d 432 (8th Cir. 1977) and can be found in the Appendix to the Petition for Certiorari at App. pp. 1-36.

The Order Denying Petition for Rehearing En Banc by an evenly divided Court is unreported and appears in Appendix B to the Petition for Certiorari at App. p. 37.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on June 21, 1977. See Appendix A to Petition for Certiorari, App. pp. 1-36 therein.

Subsequent thereto a Petition for Rehearing, Motion to Expunge Portions of Opinion and Suggestion for Rehearing En Banc was filed on the 16th day of August, 1977. The Petition for Rehearing En Banc was denied *by an evenly divided Court* (see Appendix B to Petition for Certiorari, App. p. 37). The Petition for Certiorari was filed less than ninety days from the date of the overruling of said Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

This Court granted review of this case on January 9, 1978. Pursuant to the memorandum of the Supreme Court to Counsel in Cases Granted Review on January 9, 1978, counsel for the petitioner was to designate portions of the record to be printed by January 19, 1978 and counsel for

the respondent was to cross-designate by January 30, 1978. On January 18, 1978 a letter was hand-delivered to counsel for the respondent containing a designation of the portion of the record to be printed in the Appendix tc be filed in this matter on or before February 23, 1978. At that time counsel for the respondent was also supplied with a statement of issues pursuant to Rule 36 (2) of the Supreme Court Rules, 28 U. S. C. A.

Kroger, respondent, alleged the amount in controversy exceeded $10,000. The trial court, however, never acquired subject matter jurisdiction of this action. The alleged basis of jurisdiction was diversity of citizenship. However, the respondent and Owen Equipment and Erection Company, petitioner, were both citizens of Iowa at the time of the filing of the complaint.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U. S. C. § 1332 (a):

> §1332. *Diversity of citizenship; amount in controversy; costs*
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Fed. R. Civ. P. 8(b):

(b) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

Fed. R. Civ. P. 12(h) (3):

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

Fed. R. Civ. P. 14:

(a) *When Defendant may Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case

references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

Fed. R. Civ. P. 82:

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9 (h) shall not be treated as a civil action for the purposes of Title 28, U. S. C. § § 1391-93.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

QUESTIONS PRESENTED FOR REVIEW

An action for damages for the wrongful death of James D. Kroger was commenced in the United States District Court for the District of Nebraska. The action was brought by respondent herein, Geraldine Kroger, Administratrix of the Estate of James D. Kroger, De-

ceased. She originally named as party defendants the Omaha Public Power District and Paxton-Vierling Steel Company. The petitioner was then brought in as a third-party defendant by the Omaha Public Power District. The respondent then filed an Amended Third-Party Complaint naming petitioner as defendant.

Both Paxton-Vierling Steel Company and the Omaha Public Power District were dismissed out of the suit, leaving as party plaintiff, Geraldine Kroger, *an Iowa citizen,* and as party defendant, Owen Equipment and Erection Company, a Nebraska corporation having its principal place of business in Carter Lake, Iowa, *therefore also being a citizen of Iowa.*

The petitioner then filed a Motion to Dismiss or in the Alternative for Directed Verdict claiming that the court did not have jurisdiction of the subject matter of the action since there was no diversity of citizenship between the respondent and the petitioner. But, the trial court overruled the Motion to Dismiss claiming that the Court acquired power to hear the whole matter under *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966). Petitioner's Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial, was likewise overruled. The United States Court of Appeals for the Eighth Circuit affirmed that judgment. The questions thereby arising are:

1. Whether the Trial Court acquired power to decide the claim of the respondent against petitioner.

2. Whether the Trial Court could exercise its discretion to create jurisdiction where none, in fact, existed.

3. Whether the United States Court of Appeals for the Eighth Circuit erred in making findings of fact that petitioner intentionally concealed its principal place of business without giving petitioner and its counsel a hearing on that issue in violation of the Fifth Amendment of the United States Constitution.

4. Whether the Trial Court erred in holding that an independent basis of jurisdiction need not exist between a plaintiff and a third-party defendant in order for that plaintiff to assert a claim against the third-party defendant.

5. Whether the Trial Court erred in finding that jurisdiction existed between respondent and petitioner (citizens of the same state) in Federal Court where no federal question was presented and the main cause of action between respondent and the defendant Omaha Public Power District (citizens of different states) had been dismissed prior to trial at request of defendant Omaha Public Power District.

STATEMENT OF THE CASE

Paxton & Vierling Steel Company is a Nebraska Corporation having its principal place of business in Carter Lake, Iowa (A. 5). Respondent's decedent, James D. Kroger, was an employee of Paxton & Vierling (A. 80). On the 18th day of January, 1972, at the request of a supervisor employed by Paxton & Vierling Steel, respondent's decedent assisted other Paxton & Vierling

employees in moving a large steel air tank (A. 79, 80). The steel air tank was obstructing construction activity at a construction site within the Paxton & Vierling Building (Transcript of Testimony p. 179).

Lloyd Feller, an executive vice-president of operations of Paxton & Vierling, gave the original order to move the steel air tank (Transcript of Testimony p. 179). That order was passed down to Mr. Clem Rosemaric, respondent's decedent's immediate supervisor (A. 80).

A large Lorraine crane was being used to move the tank. The crane was mounted on a truck which could move about inside the Paxton & Vierling Building (A. 67).

A steel cable ran from the boom of the crane to the chains which were wrapped around the air tank (A. 82, 83). Respondent's decedent was standing on the ground next to the steel tank assisting in steadying the tank as the crane moved from the construction site to the west end of the building (A. 83). When the crane reached the west end of the building and could go no further, the boom was raised so that the tank could be lowered (A. 83, 84). Respondent's decedent was still standing near the air tank (A. 86). As the boom of the crane was lifted, it came in close proximity to overhead power lines and an arc of electrical current jumped from the air tank into the body of respondent's decedent, causing his death by electrocution (A. 73).

On the 24th day of November, 1972, the respondent filed her complaint in the United States District Court for the District of Nebraska, claiming damages sustained

as a result of the wrongful death of James D. Kroger (A. 4). The action was brought against Omaha Public Power District (OPPD) and Paxton & Vierling (A. 4). Both Paxton & Vierling and OPPD filed motions to dismiss. Paxton & Vierling was dismissed because of a jurisdictional defect. OPPD then brought a third-party complaint against Paxton & Vierling and Owen Construction Company, Inc. claiming that both said third-party defendants were liable to the Omaha Public Power District for any sums which respondent would recover from OPPD on her complaint (A. 8).

The third-party plaintiff was then granted permission to file an amended third-party complaint naming Owen Equipment and Erection Company, a Nebraska corporation (petitioner), as an additional third-party defendant and dismissing Owen Construction Company, Inc., an Iowa corporation, from the third-party complaint (A. 12-14).

A motion to dismiss was then filed on behalf of Paxton & Vierling claiming that the complaint failed to state a claim upon which relief could be granted (A. 18). Petitioner filed its answer to the third-party complaint of OPPD (A. 19). Respondent was then granted leave to file amended pleadings adding petitioner as a party defendant (A. 23). The amended complaint was filed on November 9, 1973, naming petitioner as a party defendant and dropping Paxton & Vierling as a defendant (A. 23).

Petitioner filed its answer to the plaintiff's amended complaint (A. 28). The trial court then granted Omaha Public Power District's motion for summary judgment

and dismissed it from the lawsuit (A. 35). The United States Court of Appeals for the Eighth Circuit sustained that order of the trial court (A. p. 41).

Petitioner also filed a motion for summary judgment (A. 39). However, that motion was subsequently overruled (A. 47). Petitioner then filed an additional answer to the respondent's amended complaint alleging that the United States District Court for the District of Nebraska lacked jurisdiction of the subject matter of the action (A. 50).

The basis for petitioner's claim that the United States District Court for the District of Nebraska lacked jurisdiction of the subject matter of the action was that since the respondent and the petitioner were both *citizens of the State of Iowa there was no diversity of citizenship* and thus no independent basis of jurisdiction. Petitioner claimed that before a plaintiff could assert a claim against a third-party defendant in the same action an independent basis of federal jurisdiction was required.

Trial of this matter commenced on the 13th day of January, 1976 (A. 65).

The jury returned a verdict in favor of the respondent and against petitioner for $234,756.00 and that verdict was reduced to judgment by the Clerk of the Court (A. 54). The Court filed its memorandum and order overruling petitioner's motion to dismiss for lack of subject matter jurisdiction (A. 54-56).

The trial court conceded in that memorandum that:

"Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. § 1332; that the defend-

ant is incorporated in the State of Nebraska and has its principal place of business there. It is now uncontroverted however, that defendant's principal place of business is in the State of Iowa. *Hence, an independent basis of jurisdiction does not exist.*" (A. 55.) (Emphasis added.)

The trial court, however, went on to hold as follows:

> "The law in Nebraska is that an independent basis of jurisdiction need not exist in order for plaintiff to assert a claim against a third party defendant. See *Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 38 F. R. D. 486 (D. Neb. 1965); *Olson v. United States*, 38 F. R. D. 489 (D. Neb. 1965). Although this view was once the minority view, this Court believes it is correct.
>
> > Properly read, *United Mine Workers v. Gibbs*, 383 U. S. 715 (1966), reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case*, i. e., all claims, state or federal, which derive from a common nucleus of operative facts . . . (S)ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. *3 Moore's Federal Practice* § 14.27 (1), 14-569 to 14-570.
>
> This case is nevertheless novel, in that the third party plaintiff was dismissed. However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this 'pendant' claim. Defendant waited until trial to present its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run. Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction." (A. 55, 56).

Petitioner filed its motion for judgment notwithstanding the verdict (A. 57), and motion for new trial (A. 58), both of which were denied by order of the Court (A. 64). Petitioner then filed its notice of appeal, perfecting its appeal to the United States Court of Appeals for the Eighth Circuit (A. 64).

Among the issues presented on review to the United States Court of Appeals for the Eighth Circuit were:

1. Whether the trial court erred in holding that an independent basis of jurisdiction need not exist between a plaintiff and a third-party defendant in order for the plaintiff to assert a claim against that third-party defendant?

2. Whether the trial court erred in finding that jurisdiction existed between respondent and petitioner (citizens of the same state) in federal court where no federal questions were presented and the main cause of action between respondent and defendant OPPD (citizens of different states) had been dismissed prior to trial at defendant OPPD's request?

The Appellate Court found:

> " . . . In the case before us, the District Court stood squarely upon its discretionary powers in the premises, relying on *Gibbs*. Defendant Owen attacks the

applicability of this doctrine to the case at bar, asserting that the dismissal of the plaintiff's claim against OPPD before trial limits the discretion of the District Court. We do not so conclude. It is but one factor, among many others, to be considered." (Appendix to Petition for Certiorari, App. p. 21).

The Court went on to hold:

"But beyond that, however, there are other considerations. By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly, or, indeed, if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists that it is clear to all that jurisdiction may be challenged by anyone at any time.

"But plaintiff overlooks the application of the Gibbs doctrine to ancillary the litigation. The District Court had judicial power over the case initially and we find no abuse of its discretion in the continued exercise of that power. But beyond that, whether the court's discretion was abused or not in its retention of the cause, defendant's conduct estops it from asserting abusive discretion, not only that under the teachings of Murphy v. Kodz, supra, but also under the most elementary considerations of judicial fairness. 'Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remains silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered. . . .' The doctrine of the perpetual availability of jurisdictional challenge furnishes no sanctuary to appellant in the light of such conduct." (Appendix to Petition for Certiorari, Appendix A, App. p. 22).

Petitioner has now filed its Petition for Certiorari and Review was granted by this Court on January 9, 1978.

SUMMARY OF ARGUMENT

When a plaintiff asserts a claim against a third party defendant, there must be an independent basis of jurisdiction to support that claim. In this case, it is conclusively established that respondent (plaintiff below) and petitioner (third party defendant below) were both citizens of the State of Iowa and, therefore, there was no independent basis of jurisdiction to support the claim made by respondent against petitioner.

Rule 12(h)(3) of the Federal Rules of Civil Procedure provides that whenever it appears that a court lacks subject matter jurisdiction, either by suggestion of parties or otherwise, the court shall dismiss the action. On the second day of trial, after testimony from petitioner's corporate office that its principal place of business was in Carter Lake, Iowa, petitioner filed an amended answer, claiming there was no subject matter jurisdiction of the action. The trial court denied that Motion to Dismiss, claiming that it acquired power under *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), to hear the entire claim. The only party with whom there had been diverse citizenship, the defendant, Omaha Public Power District, was dismissed from the action prior to trial, leaving before the court a state law claim involving citizens of the same state. A judgment was entered against the petitioner and in favor of the respondent in the sum of $234,756.00.

A claim by a plaintiff against a 3rd party defendant must be supported by an independent basis of jurisdiction. Since there was none in this case the court had no power to enter the judgment. Moreover, since OPPD was

dismissed prior to trial petitioners should also have been dismissed. Under *Gibbs,* if the state claim is dismissed prior to trial the federal claim likewise must be dismissed.

On appeal, the United States Court of Appeals for the Eighth Circuit made findings of fact and inferences of material fact which were not made by the trial court without granting petitioner a hearing, in violation of the Due Process Clause of the 5th Amendment. The Eighth Circuit found that the petitioner used "subtle and adroit pleading" to gain a substantial advantage. In its Answer which it filed to respondent's Amended Complaint, adding petitioner as defendant, petitioner claimed it was a corporation organized and existing under the laws of the State of Nebraska. Petitioner neither admitted nor denied the situs of its principal place of business. Although, the lack of such denial is completely within the provisions of Rule 8(b), the petitioner denies that there was any intentional scheme to conceal petitioner's principal place of business.

This case is unusual in that the respondent did not file her Complaint against the petitioner until nearly two months before the statute of limitations would bar the claim. The petitioner filed its general denial to protect Answer Day approximately six weeks before the statute ran. No further action occurred on the case until the 3rd day of June, 1974, when the respondent took the deposition of petitioner at its principal place of business in Carter Lake, Iowa. The respondent was the party attempting to assert the existence of federal jurisdiction. Since there is a presumption against the existence of federal jurisdiction, the party attempting to involve the federal court's jurisdiction bears the burden of proof on that issue. Therefore, on the 3rd day of June, 1974, the respondent should

have known that she could not go forward with her burden of proving subject matter jurisdiction.

In *M. C. and L. M. Railway Co. v. Swan,* 111 U. S. 379 (1897) this court held that the rule "is inflexible and without exception" that a court of its motion must deny its own jurisdiction and that of all other courts of the United States where jurisdiction does not appear on the record. This is because of the presumption against the existence of jurisdiction. The question is not what the parties may be allowed to do, but whether this court can affirm or reverse a judgment when lack of jurisdiction appears on the record.

In *American Fire & Casualty Company v. Finn,* 341 U. S. 6 (1951) this court further held that parties can never stipulate to the existence of jurisdiction and jurisdiction cannot arise by estoppel, yet the Eighth Circuit in the instant action held that petitioner was estopped by its delay in raising the lack of subject matter jurisdiction for more than two years after the statute of limitations had run.

If this defendant were "intentionally sandbagging" the court why wouldn't it have waited until the day after the staute of limitations ran to raise the issue of lack of diversity of citizenship? Why wouldn't petitioner have passed its motion for summary judgment filed September 4, 1974 on lack of subject matter jurisdiction?

The question of the petitioner's conduct, however, should in no way affect the existence of jurisdiction. In the trial court jurisdiction either exists or it does not. Jurisdiction cannot be created by discretion, waiver, estoppel, consent or stipulation. This case should have been dismissed at the trial court level.

ARGUMENT

I.

The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States in all cases where the jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

M. C. & L. M. Railway Co. v. Swan, 111 U. S. 379 (1897).

Federal Courts are courts of limited jurisdiction. That jurisdiction is only as marked out by Congress. *Aldinger v. Howard,* 427 U. S. 1 (1976).

In the early case of *M. C. & L. M. Railway Co. v. Swan,* 111 U. S. 379 (1897), this court addressed the delicate but volatile question of the exercise of jurisdiction by a federal court in cases involving diversity of citizenship. The Court stated:

> "And according to the uniform decisions of this Court, the jurisdiction of the circuit court fails, unless the necessary citizenship affirmatively appears in the pleadings or else were in the record. . . .
>
> It is true that the plaintiffs below, against whose objection the error was commited, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; *but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where the jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.* On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when otherwise suggested, and without respect to the relation of the parties to it." (Emphasis added.)

Mr. Justice Matthews, who delivered the opinion of the Court, quoted from an opinion of Mr. Justice Harlan stating:

> "And in the most recent utterance of this court upon the point in *Bors v. Preston,* anti, 252, it was said by Mr. Justice Harlan:
>
> "'In cases of which the circuit courts may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, have except under special circumstances, declined to express any opinion on the merits, on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; *this, because the courts of the union, being courts of limited jurisdiction, the presumption in every stage of the cause is, that it is without their jurisdiction, unless the contrary appears from the record.'*
>
> "The reason of the rule, and the necessity of its application are stronger and more obvious, when, as in the present case, the failure of the jurisdiction of the circuit court arises, not merely because the record omits the averments necessary to its existence, but

because it recites facts which contradict it." (Emphasis added.)

So important was it deemed that the federal courts act only within their well defined limits of jurisdiction, that this court therein adopted a special exception to the rule that a party may not "rely on anything as cause for reversing a judgment which was for his advantage." *Dred Scott* case, 19 HOW 393-400, and *M. C. & L. M. Railway Co. v. Swan,* supra. This court reiterated that rule, emphasizing:

> "In the *Dred Scott Case,* 19 How. 393-400, it was decided that a judgment of the Circuit Court, upon the sufficiency of a plea in abatement denying its jurisdiction, was open for review upon a writ of error sued out by the party in whose favor the plea had been overruled. And in this view Mr. Justice Curtis, in his dissenting opinion, concurred; and we adopt from that opinion the following statement of the law on the point: 'It is true,' he said, 19 How. 566, 'as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac. Ab. Error II, 4. And this court followed this practice in *Capron v. Van Noorden,* 2 Cranch, 126, where the plaintiff below procured the reversal of a judgment for the defendant on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction. But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor.

> *The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend.* The course of the court is, where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist. *Pequignot v. The Pennsylvania Railroad Company,* 16 How. 104. It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. *Cutler v. Rae,* 7 How. 729. I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is, *sua sponte,* if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power," (Emphasis added.)

Of equal import is the rule that:

> "unlike an objection to venue, lack of federal jurisdiction cannot be waived or overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review. *Mansfield, C. & L. M. Ry. Co. v. Swan,* 111 U. S. 379, 382. Hence, the failure of the insurance commissioner to claim, in his Petition for Certiorari, that the order of the district court was void for lack of federal jurisdiction of the suit, and his failure otherwise to call to the attention

of this court the lack of diversity of citizenship are immaterial." *Mitchell v. Maurer*, 293 U. S. 237 (1934).

And, in *American Fire and Casualty Co. v. Finn*, 341 U. S. 6 (1951), this Court noted:

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them."

Also, standing for the proposition that an objection to jurisdiction based on lack of complete diversity between the parties in a lawsuit is never waived nor is it lost by stipulations, see *Bialac v. Harsh Building Co.*, 463 F. 2d 1185 (9th Cir. 1972); *Page v. Wright*, 116 F. 2d 453 (7th Cir. 1940).

It is also well established that subject matter jurisdiction may be litigated at any time before the case is finally decided, and if the parties do not raise the question of lack of jurisdiction it is the duty of the Court to raise it on its own motion sua sponte. *M. C. & L. M. Railway Co. v. Swan, Eisler v. Stritzler*, 535 F. 2d 148 (1976), *Kenrose Manufacturing Co. v. Fred Whitaker Co.*, 53 F. R. D. 491 (1971), *Basso v. Utah Power and Light Company*, 495 F. 2d 906 (10th Cir. 1974) and Fed. R. Civ. P. 12 (h) (3).

In *Basso v. Utah Power and Light Company*, supra, the 10th Circuit stated:

> Rule 12(h) (3) of the Federal Rules of Civil Procedure provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking. Bradbury v. Dennis, 310 F. 2d 73 (10th Cir. 1962), cert. denied, 372 U. S. 928, 83 S. Ct. 874, 9 L. Ed. 2d 733 (1963). The party invoking the jurisdiction of the court has the duty to establish that federal jurisdiction does exist, Wilshire Oil Co. of Texas v. Riffe, 409 F. 2d 1277 (10th Cir. 1969), but, since the courts of the United States are courts of limited jurisdiction, there is a presumption against its existence. City of Lawton, Okla. v. Chapman, 257 F. 2d 601 (10th Cir. 1958). Thus, the party invoking the federal court's jurisdiction bears the burden of proof. Becker v. Angle, 165 F. 2d 140 (10th Cir. 1947).
>
> If the parties do not raise the question of lack of jurisdiction, it is the duty of the federal court to determine the matter *sua sponte*. Atlas Life Insurance Co. v. W. I. Southern Inc., 306 U. S. 563, 59 S. Ct. 657, 83 L. Ed. 987 (1939); Continental Mining and Milling Co. v. Migliaccio, 16 F. R. D. 217 (D. C. Utah 1954). Therefore, lack of jurisdiction cannot be waived and jurisdiction c a n n o t be conferred upon a federal court by consent, *inaction* or stipulation. California v. LaRue, 409 U. S. 109, 93 S. Ct. 390, 34 L. Ed. 342 (1972); Natta v. Hogan, 392 F. 2d 686 (10th Cir. 1968); Reconstruction Finance Corp. v. Riverview State Bank, 217 F. 2d 455 (10th Cir. 1955). (Emphasis added.)

But, in the instant action, the appellate court ignored each of these tenets and found that:

"In the case before us, the district court stood squarely upon its discretionary powers in the premises, relying on *Gibbs*. . . .

But the plaintiff (sic) overlooks the application of the *Gibbs* doctrine to ancillary litigation. The district court had judicial power over the case initially and we find no abuse of its discretion in the continued exercise of that power. But beyond that, whether the court's discretion was abused or not in its retention of the cause, defendant's conduct estops it from asserting abuse of discretion, not only under the teaching of Murphy v. Kodds, supra, but also under the most elementary considerations of judicial fairness. . . .

The doctrine of perpetual availability of jurisdictional challenge furnishes no sanctuary to appellant in the light of such conduct."

It is the contention of the petitioner that *United Mine Workers v. Gibbs*, supra, does not apply to this case, since it deals not with ancillary jurisdiction, but rather with pendant jurisdiction. In finding that *Gibbs* was controlling, however, the Eighth Circuit chose to apply only that portion which would support the judgment of the trial court and discarded that portion of *Gibbs* which would have required the dismissal of this action.

This Court in *Gibbs* admonished that "certainly, if the federal claims are dismissed before trial, even though not insubstantial in the jurisdictional sense, the state claims should be dismissed as well." As is more fully hereinafter argued under a subsequent proposition of law the defendant OPPD, *the only defendant having diversity of citizenship with the plaintiff*, was dismissed from the suit prior to trial leaving before the federal court a matter involving a state law claim and citizens of the same state.

It was argued by petitioner on appeal that this likewise compelled the dismissal of the claim by the respondent against petitioner. But the Eighth Circuit circumvented that obstacle claiming:

> "Defendant Owen attacks the applicability of this doctrine to the case at bar, asserting that the dismissal of the plaintiff's claim against OPPD before trial limits the discretion of the district court. We do not so conclude. It is but one factor, among many others to be considered."

In the case of *Basso v. Utah Power and Light Company*, supra, the defendant corporation admitted that it was "a corporation duly organized and existing under the laws of the State of Maine and is engaged, among other things, in the business of supplying electricity in the State of Utah and specifically to Carbon City, Utah." The Tenth Circuit stated:

> "Although defendant did not present evidence to support dismissal for lack of jurisdiction, the burden rested with the plaintiffs to prove affirmatively that jurisdiction did exist. . . . The defendant's failure to raise the issue before final judgment did not amount to a waiver, since a court may dismiss a case for lack of jurisdiction at any stage of the proceeding."

The Tenth Circuit then reviewed this court's decision in *American Fire and Casualty Company v. Finn*, supra, stating:

> "III.
>
> "We are mindful that it appears unjust to allow a defendant to make an attack on jurisdictional grounds after final judgment has been entered, but an opposite

result would unlawfully expand the jurisdiction of the federal courts by judicial interpretation. This cannot be done. *American Fire and Casualty Co. v. Finn,* 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951). In the *Finn case, the Supreme Court held that a defendant who removed a case to federal court and then received an adverse judgment there was not estopped from attacking his own prior removal on the grounds that the federal court had lacked diversity jurisdiction to hear the matter.* The Supreme Court reasoned that the jurisdiction of the federal courts is limited and must be carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. The Supreme Court explained that parties to an action can never stipulate to the existence of federal jurisdiction because this would give an additional power to the district courts which Congress had expressly denied. 341 U. S. at 17-18, 71 S. Ct. 534." (Emphasis added.)

The effect of the Eighth Circuit's finding is that a Federal District Court may not acquire subject matter jurisdiction over a cause of action where there is no diversity of citizenship between the parties by the mere running of the statute of limitations. The further effect of the holding is that a defendant may never raise the defense of lack of subject matter jurisdiction after the statute of limitations has run and any defendant that does so is guilty of concealment and unethical conduct.

Rule 12 (h) (3) provides as follows:

> "Whenever it appears by suggestion by the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

That rule emphasizes that a subject matter jurisdiction defect requires dismissal whenever that defect becomes

apparent, not merely prior to the running of the statutes of limitations on the plaintiff's claim.

The amended complaint of respondent against the petitioner was filed November 9, 1973 (A. 23), approximately two months prior to the running of the statute of limitations on January 18, 1974. In its answer to amended complaint filed November 27, 1973, petitioner admitted that Owen Equipment and Erection Company was a corporation organized and existing under the laws of the State of Nebraska and denied each and every other allegation in the Respondent's complaint.

The Eighth Circuit found that the petitioner's answer did not comply with the terms of Rule 8 (b). Petitioner emphatically claims that its answer conformed in all respects to the requirements of this rule. Petitioner admitted that it was a corporation organized and existing under the laws of the State of Nebraska and denied all other allegations. Rule 8 (b) specifically provides:

> ". . . the pleader . . . may generally deny all the averments except such averments or paragraphs as he expressly admits; . . ."

Less than two months after petitioner filed its answer to the amended complaint, the statute of limitations ran. No further action on the file occurred until May 23, 1974 when a hearing on OPPD's motion for summary judgment was had before Judge Denney (A. 2). The statute of limitations had already run more than five months prior to that date. The issue of the lack of subject matter jurisdiction of the court was not raised by petitioner until its answer filed January 13, 1976, the second day of trial (A. 48).

If petitioner were intentionally "sandbagging" the court, why then didn't petitioner wait until the day after the statute of limitations had run on January 19, 1974 to raise the issue of lack of subject matter jurisdiction, rather than waiting until the first day of trial to raise the issue? Why wouldn't the issue of lack of diversity of citizenship have been the subject of the motion for summary judgment which this defendant filed September 4, 1974? (A. 39).

The only reason this issue was not raised at an earlier point in the proceedings was that counsel failed to examine that issue. During trial, appellant's corporate counsel, Robert Becker of the law firm of Swarr, May, Smith & Andersen, advised Attorney David A. Johnson who was trying this case on behalf of Owen Equipment and Erection Company that Owen was a Nebraska corporation, but that its principal place of business was in Iowa, and that there was no subject matter jurisdiction. Shortly thereafter, a motion to dismiss was filed on behalf of Owen Equipment and Erection Company. This is the first time this matter was given any consideration by petitioner. (See affidavits of corporate and trial counsel from petition for rehearing in the Appendix, A. 102, 103.)

Likewise, it is obvious that the matter was never considered to be an issue by counsel for respondent who took at least four pre-trial depositions in the corporate office of defendant in Carter Lake, Iowa. Two of these depositions were taken of corporate officers.

But it is beyond the understanding of petitioner how the issue of concealment could even come before the 8th

Circuit. The rule of the Eighth Circuit as well as other circuits throughout the nation has unanimously been that there is a presumption against the existence of Federal jurisdiction, and thus the party involving the Federal court's jurisdiction bears the burden of proof as to its existence. See *M. C. & L. M. Railway Co. v. Swan,* supra; *Basso v. Utah Power and Light Co.,* supra; *Emmke v. DeSilva,* 293 Fed. 17 (8th Cir. 1923).

The burden rested on the respondent to overcome the presumption. Respondent discovered as early as June 3, 1974 that the principal place of business of petitioner was Carter Lake, Iowa. On that date at 1:30 P.M. respondent's counsel took the deposition of the President of petitioner in its office of Owen *in Carter Lake, Iowa* (A. 93-95). During that deposition the following questions were asked of Mr. Owen by respondent's counsel:

> "Q. And would you tell me where the headquarters of Owen Equipment and Erection Company is?
>
> A. Here, same headquarters.
>
> Q. Same headquarters.
>
> A. Yes. . . .
>
> Q. I have the impression in my mind's eye, and I don't know, that you have the headquarters at the same place and you have the same officers and it seems to be operated out of the same place. Is one company just the same as the other?" (A. 95).

On the 24th day of November, 1972 respondent filed her complaint wherein she alleged under paragraph 5 as follows:

> "That on January 18, 1972, plaintiff's decedent was employed working in the capacity of a machinist for

> the defendant, Paxton and Vierling Steel Company at *its place of business in Carter Lake, Iowa. . . .*" (Emphasis added.) (A. 5).

So on the 3rd day of June, 1974, respondent knew that it could not go forward with its burden of proving subject matter jurisdiction. However, the Eighth Circuit chose to believe that petitioner connived respondent and the trial court and concealed from both the principal place of business of the petitioner until the second day of trial.

Isn't it just as conceivable that the exact opposite conclusion could have been reached by the Eighth Circuit on these same facts? After June 3, 1974, it certainly would have behooved respondent to conceal the jurisdictional issue. Respondent had nothing to lose for the statute had already run. She could later claim tardiness when the petitioner raised the issue.

The 8th Circuit Court relies heavily on the case of *Di Frischai v. New York Central Railroad,* 279 Fed. 2d 141 (3rd Cir. 1960) as authority for its findings. In his treatise of Law of Federal Courts, Wright questions this decision stating:

> "This argument seems to assume that the court has discretion to hear a case where jurisdiction is not present, a very questionable assumption." Law of Federal Courts, Charles Alan Wright, West Publishing Co., 1970, page 17.

In *Eisler v. Stritzler,* 535 F. 2d 148 (1st Cir. 1976), the First Circuit addressed the *Di Frischia* case stating:

> "*Di Frischia v. New York Central R. Co., supra,* stands almost alone as a challenger to the traditional federal court practice. There the Third Circuit refused to permit a defendant, who had stipulated to

> the existence of diversity jurisdiction after having initially denied it, from moving to dismiss for want of jurisdiction two years after the action had been instituted. The court rested its decision principally on the ground that it would not allow a party to 'play fast and loose with the judicial machinery and deceive the courts.' *Id.* at 144. Little authority was cited to support the court's decision, and what little there was seems inapposite. Although we tend to agree that the *Di Frischia* rule is preferable to the present practice, we do not regard ourselves as free to adopt it. We note that *Di Frischia* has not proved to be a particularly generative inroad on the traditional rule, even in the Third Circuit. See *Joyce v. United States,* 474 F. 2d 215 (3d Cir. 1973); *Ramsey v. Mellon National Bank & Trust Co.,* 350 F. 2d 874 (3d Cir. 1965)."

II.

The basic elements of a full and fair "hearing" include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain, or rebut all such evidence.

Carter v. Kupler, 320 U. S. 243, 64 S. Ct. 1.

United States v. Dilman, 146 F. 2d 572 (5th Cir., 1945).

Petitioner respectfully submits that the United States Court of Appeals for the Eighth Circuit in its opinion filed June 21, 1977, made findings of fact which are not supported by the record on appeal and also made inferences of material facts which were not made by the trial court.

A finding was made concerning the conduct of petitioner when that issue was never before the trial court. The appellate court so concluded without giving petitioner an opportunity to introduce evidence at a properly conducted hearing, in violation of the due process clause of the 5th Amendment of the United States Constitution.

The court's opinion unequivocally claims petitioner has perpetrated acts of fraud, not only upon respondent but upon the Federal judicial system.

It is one thing for the trial court to assume jurisdiction where none in fact exists, yet it is still another for the Eighth Circuit to justify its holding by claiming fraud on the part of the petitioner. The issue of the concealment of the citizenship of the petitioner never matured until oral argument was had before the Eighth Circuit. Yet, a finding was made on appeal that petitioner concealed the issue of diversity of citizenship until the statute of limitations had run so as to gain "a substantial advantage" over respondent. The factual findings, however, were not merely limited to a determination of concealment. The court elected to publish what it contended to be the strategy underlying this fictional tactic of concealment, without ever having had the advantage of evidence concerning the same.

> "By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly, or, indeed if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists it is clear to all that jurisdiction may be

> challenged by anyone at any time." (Appendix to Petition for Certiorari A. 22.)

The only issue before the trial court was that of whether pendant or ancillary jurisdiction existed. Respondent's counsel commented on the lateness of the petitioner's claim of no diversity of citizenship (A. 92-96).

Petitioner's attorney countered that argument and the court agreed. The colloquy between the court and counsel was as follows:

> "Mr. Johnson: Also in regard to his initial comment about our lateness in raising this, I would just say this—
>
> The Court: That can be raised at any time.
>
> Mr. Johnson: That is right. This is not an equitable case.
>
> The Court: That has been the rule since time began.
>
> (Page 207) Mr. Johnson: As to laches, estoppel or waiver, the Court either has it or it doesn't.
>
> The Court: The only thing that concerns me is this pendant or ancillary question . . ." (A. 96).

If the trial court had indicated during the trial that concealment was an issue, petitioner could have offered evidence in support of its innocence. But, the trial court emphasized that the only issue was the existence of pendant or ancillary jurisdiction.

The 5th Amendment to the Constitution of the United States of America guarantees the right of each party to examine, explain and rebut all evidence. In the case of *Carter v. Kupler*, supra, this court stated:

"Moreover, once a hearing has been ordered, § 75, sub. s(3), necessarily guarantees that it shall be a fair and full hearing. The basic elements of such a hearing include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence. Tested by that standard, the personal investigation by the conciliation commissioner cannot be justified. It was apparently made without petitioner's knowledge or consent and no opportunity was accorded petitioner to examine or rebut the evidence obtained in the course of such inevstigation. The use of this evidence was therefore inconsistent with the right to a fair and full hearing."

The United States Court of Appeals for the Fifth Circuit in the case of *United States v. Dilman,* supra, extended the guarantee of the due process clause of the 5th Amendment of the Constitution to actions by a trial judge. In that case, the court stated:

"The basic elements of a full and fair hearing 'include the right of each party to the apprised of all the evidence upon which factual adjudication rests, plus the right to examine, explain or rebut all such evidence. Tested by that standard, the personal investigation by the conciliation commissioner (the trial judge here) cannot be justified.' Carter v. Kupler, 320 U. S. 243, 247, 64 S. Ct. 1, 3."

No evidence ever having been adduced on the issue of concealment in the instant matter by the trial and the trial court's insistence that concealment was not an issue, petitioner never had the opportunity to "examine, explain or rebut all such evidence."

Moreover, in the case of *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U. S. 125 (1969) this court stated:

"In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*"

And, in *Hodgson v. Okada,* 472 F. 2d 965 (10th Cir. 1973), the Tenth Circuit Court of Appeals further addressed that doctrine stating:

"It is not the function of the court of appeals to infer material facts. *Cross v. Pasley,* 267 F. 2d 824 (8th Cir. 1959). Nor may the appellate court make a controlling inference which the trial court has not made and which, if done, would in effect constitute a trial de novo. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U. S. 100, 89 S. Ct. 1562 (1969)."

The Eighth Circuit Court of Appeals, without the benefit of any evidence on the issue, inferred that petitioner intentionally concealed from the Court and the respondent the citizenship of petitioner. It is true that the trial court indicated that the delay in raising lack of diversity of citizenship was never explained. However, the trial court did not make any finding that there was intentional concealment. The Eighth Circuit, from the circumstances, inferred that there was intentional concealment even though the trial court failed to make any such inference. This is in effect a decision of a factual issue de novo in violation of the mandate of this court in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* supra.

III.

An independent basis of jurisdiction is required to support a plaintiff's claim against a third-party defendant.

United States v. Lushbough, 200 F. 2d 717 (8th Cir. 1952).

Fawver v. Texaco, Inc., 546 F. 2d 636 (5th Cir. 1977).

Saalfrank v. O'Daniel, 533 F. 2d 325 (6th Cir. 1976).

Aldinger v. Howard, 427 U. S. 1 (1976).

Kenrose Mfg. Co. v. Fred Whitaker Ford Co., 512 F. 2d 890 (4th Cir. 1972).

Kenrose Mfg. Co. v. Fred Whitaker Co., 53 F. R. D. 491 (1971).

Rivera Copper & Brass v. Aetna Casualty Co., 426 F. 2d 709, 12 A. L. R. Fed. 389 (5th Cir. 1970).

Palumbo v. Western Maryland Railway Company, 271 F. Supp. 361 (1967).

The trial court concluded in its memorandum overruling defendant's motion for dismissal for lack of subject matter jurisdiction filed on January 23, 1976, that:

> "Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. § 1332; that the defendant is incorporated in the State of Nebraska and has its principal place of business there. It is now uncontroverted, however, that defendant's principal place of business is in the State of Iowa. Hence, an independent basis of jurisdiction does not exist." (A. 55).

There is no dispute that had the respondent originally sued Owen Equipment & Erection Company, Inc., there would be no diversity of citizenship and thus, no jurisdiction. However, the trial court held that under "the law in Nebraska", a plaintiff may assert a claim against the third-party defendant without an independent

basis of jurisdiction. As authority for its holding, the trial court cited cases of *Union Bank & Trust Co. v. St. Paul Fire & Marine Insurance Co.,* 38 F. R. D. 46 (D. Neb., 1965); *Olson v. United States,* 38 F. R. D. 489 (D. Neb., 1965); and *United Mine Workers of America v. Gibbs,* 383 U. S. 715 (1966).

The first case cited hereinabove does not serve as authority for the Trial Court's holding, for in that case, a claim was made by a third-party defendant against the plaintiff and it was decided that no independent jurisdictional base was required. This is, of course, substantially different than the instant matter where a plaintiff is making a claim against the third-party defendant. This distinction was pointed out in the case of *Rivera Copper & Brass v. Aetna Casualty Co.,* 426 F. 2d 709, 12 A. L. R. Fed. 389 (5th Cir. 1970). Therein, the Fifth Circuit Court of Appeals stated:

> "A cursory review of the joinder situations to which ancillary jurisdiction is applied reveals that generally, it is made available to litigants in a defensive posture, who would otherwise be prevented or greatly burdened in adequately protecting their interests. There is much to be said for allowing parties who are involuntarily brought into federal court to defend against a claim or who must be allowed to intervene in a federal action as a defendant to secure their interests, to assert all their claims arising out of the controversy in one proceeding and as this is, or ought to be, one of the factors to be considered in determining the existence of ancillary jurisdiction.
>
> . . .
>
> "Echoing Professor Moore, Revere argues that since there must be an independent ground of jurisdiction to support the original plaintiff's claim against

a third-party defendant, the same requirement must be met by the third-party defendant in asserting a counterclaim against the original plaintiff. *Suffice it to say that the two situations are the converse of each other only superficially and that there are differences which militate against identical treatment. First of all, the plaintiff has the option of selecting the forum where he believes he can most effectively assert his claims, he has not been involuntarily brought to a forum, faced with the prospect of defending himself as best he can under the rules that forum provides, or defending himself not at all.* Since the plaintiff could not initially join a non-diverse defendant, it is arguable he should not be allowed to do so indirectly by way of a fortuitous impleader. Moreover, there is possibility, whether real or fanciful, or collusion between the plaintiff and an overly cooperative defendant impleading just the right third party." (Emphasis added.)

The differences are obvious. The Respondent here selected the forum, Petitioner did not.

The trial court cited as further authority for its holding that the law in Nebraska is that an independent basis of jurisdiction need not exist in order for a plaintiff to assert a claim against a third-party defendant, the case of *Olson v. United States,* supra. In that case, Judge Van Pelt chose to follow the minority rule and hold that an independent basis of jurisdiction need not exist before a plaintiff can assert a claim against a third-party defendant. It must be emphasized, however, that this minority stand has been taken by a very limited number of courts that have addressed the issue. Other cases which have commented on *Olson* have never followed this decision, but have only criticized it.

In *Kenrose Manufacturing Co. v. Fred Whitaker Co.,* 53 F. R. D. 491 (1971), the United States District Court for the Western District of Virginia stated:

> "On the other hand, there are a few cases which would not require the plaintiff to have an independent basis of jurisdiction in order to amend his complaint to include a third-party defendant with the same citizenship. *Buresch v. American LaFrance,* 290 F. Supp. 265 (W. D. Pa., 1968); *Olson v. United States,* 38 F. R. D. 489 (D. Neb., 1965). These cases regard a plaintiff's claim against a third-party defendant as ancillary to the original action. In *Buresch,* supra, Judge Gourley, Chief Judge of the Western District of Pennsylvania, felt that to deny ancillary jurisdiction in a case similar to the one at bar would defeat the purpose of avoiding multiplicity of suits and piecemeal litigation. In *Olson,* supra, Judge Van Pelt of the District Court of Nebraska stated that the fact that there may be collusion in some cases should not prevent plaintiffs from asserting their complaints against the third-party defendants in all cases. This minority view favoring expansion of ancillary jurisdiction to cover the situation at bar also has apparent support from some legal writers. See 6 Wright & Miller, Federal Practice and Procedure § 1444, p. 232 (1971); *Fraser,* supra, 33 F. R. D. at 41-43; *Holtzhoff,* supra, 31 F. R. D. at 110.
>
> "It should be noted, however, that there is still much disagreement on this point. For example, the *Buresch* decision originated from the Western District of Pennsylvania in 1968. Subsequent to that date two cases decided in that same district have rejected the view that no independent basis of jurisdiction is required. *Schwab v. Erie Lackawanna Railroad,* 303 F. Supp. 1398 (W. D. Pa., 1969); *Ayoub v. Helm's Express, Inc.,* 300 F. Supp. 473 (W. D. Pa., 1969) (Judge Weber, District Judge, Decided Both Cases)."

The *Kenrose Manufacturing Co. case* was appealed to the Court of Appeals for the Fourth Circuit. That appeal appears at 512 F. 2d 890 (4th Cir. 1972). That Court cited four cases as following the minority view. Those cases were: *Buresch v. American LaFrance,* 290 F. Supp. 265 (W. D. Pa., 1968); *Olson v. United States,* 38 F. R. D. 489 (D. C. Neb., 1965); *Myer v. Lyford,* 2 F. R. D. 507 (M. D. Pa., 1942); and *Skylar v. Hays,* 1 F. R. D. 594 (E. D. Pa., 1941). In discussing those cases that Court stated:

> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks to avoid is available without question in the state courts. The majority view, as outlined above, has its own valid supporting reasons and we fail to discern any movement away from the well-established rule, which is directly contrary to appellant's contention.
>
> "It is true that four lower court cases have favored appellant's view. However, not only are these in the minority among the decided cases, but they have been far from convincing to other judges in the very jurisdictions where they were rendered."

In a footnote discussing how other judges have rejected the minority view, the Court stated:

> "For example, subsequent to the *Buresch* case, cited in note 9, two decisions issuing from the same court specificially rejected *Buresch.* See *Schwab v. Erie Lackawanna R. R.,* 303 F. Supp. 1398 (W. D. Pa. 1969), and *Ayoub v. Helm's Express, Inc.,* 300 F. Supp. 473 (W. D. Pa. 1969). In *Ayoub,* the Court said:

> " 'There is no diversity of citizenship between the plaintiff and the present third-party defendant against whom plaintiff wishes to assert a direct claim. The great weight of authority requires that there be diversity of citizenship between such parties. Although such a claim was allowed to be asserted in *Buresch* • • • I do not believe that this opinion represents the view of a majority of the members of this District Court or the view of the majority of the federal courts.' "

In the case of *Palumbo v. Western Maryland Railway Company,* 271 F. Supp. 361 (1967), Chief Judge Thomsen of the United States District Court for the District of Maryland, commented on Judge Van Pelt's holding in *Olson v. United States* in light of the comments of the Advisory Committee on the Federal Rules of Civil Procedure and existing case law. Judge Thomsen stated:

> "When Rule 14 was first adopted, Professor Moore expressed the opinion that independent grounds of jurisdiction would be required to support a plaintiff's claim against a third-party defendant, and most of the courts have taken that view. See **3A Moore's Federal Practice,** 2d ed., p. 24.27(I) and cases cited therein. In Friend v. Middle Atlantic Transp. Co., 153 F. 2d 778 (2d Cir. 1946), cert. denied, 328 U. S. 865, 66 S. Ct. 1370, 90 L. Ed. 1635, Judge Clark, speaking for the Second Circuit (as well as out of his experience as Chairman of the Advisory Committee on Rules) said:
>
> " 'May a defendant cause a third party to be brought into a federal civil action under Federal Rules of Civil Procedure, Rule 14, 28 U. S. C. A following section 723c, to answer, along with it, to the plaintiff's claim, where the plaintiff and such party are citizens of the same state and federal jurisdiction does not otherwise appear? That is the issue squarely presented here, and we

think it must be answered in the negative. Notwithstanding the undoubted convenience of extensive joinder in cases such as this, we must observe the established boundaries of federal jurisdiction, which the rules do not enlarge. F. R. 82, 153 F. 2d at 779.

"When Rule 14 was amended in 1948, the Advisory Committee noted that 'in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. The note referred to a number of cases and commentators. Since the amendment, the weight of authority has continued to require independent grounds of jurisdiction for such a claim. Moore, op. cit., p. 14.17(1).

"Judge Van Pelt assembled all the arguments to the contrary in his opinion in Olson v. United States. 38 F. R. D. 489, 490 (D. Neb. 1965), and refuses to follow the majority view. He noted that some courts have expressed 'the danger of collusion between the original parties thereby enabling a plaintiff to assert a claim against a co-citizen in the federal courts through the use of a third-party practice.' Fear of collusion is not the principal argument supporting the majority rule. Wherever the law provides for contribution among joint tortfeasors, or a defendant has a possible claim for indemnity, the defendant will ordinarily file a third-party complaint, giving plaintiff the opportunity to assert a claim against the third-party defendant.

"The principal reason for the majority rule was tersely stated in McPherson v. Hoffman, 275 F. 2d 466 (6 Cir. 1960), as follows:

> " 'Under the Federal Employers' Liability Act the plaintiff could bring his action against the railroad in Federal Court without diversity of citizenship. Section 56, Title 45, U. S. C. A. He could not have sued the McPhersons in Federal Court separately nor could he have joined them with Chesapeake and Ohio because there was no diversity of citizenship between him and the McPhersons, Section 1332, Title 28, U. S. C. What he could not do directly could not be done for him indirectly. The court did not have jurisdiction to enter a judgment against third-parties defendant in favor of the plaintiff Hoffman. Jurisdiction cannot be waived.' 275 F. 2d at 470."

Moreover, in one of its prior decisions the 8th Circuit chose to follow the majority rule and hold contrary to the ruling of Judge Van Pelt in *Olson v. United States,* supra.

In the case of *United States v. Lushbough,* 200 F. 2d 77 (8th Cir. 1951), plaintiff Lushbough brought an action under the Federal Tort Claims Act against the United States for damages he sustained in an automobile collision. The United States impleaded Hoffman as a third-party defendant, stating he was liable over to the United States for any judgment Lushbough might obtain against it. The District Court found that Hoffman's negligence was the cause of the collision and entered a judgment in favor of the plaintiff Lushbough against the United States and against Hoffman in the sum of $50,000.00. The District Court also awarded judgment against Hoffman on the third-party complaint of the United States. Both the United States and Hoffman appealed from the judgment in favor of Lushbough. This Court in reversing the judgment in favor of Lushbough against Hoffman stated:

> "We think the judgment against Hoffman in favor of Lushbough must also be reversed. Lushbough

brought no action against Hoffman, asked for no judgment against him. Rule 14(A) of the Rules of Civil Procedure, 28 U. S.C. provides that: 'The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.' Lushbough asserted no claim against Hoffman. But, conceding for the argument that such an assertion was a formality not required under the Federal Rules of Civil Procedure, Lushbough's right to maintain a claim against Hoffman is prohibited by 28 U. S. C., Section 2676, which provides:

> " 'The judgment in an action under Section 1346(B) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.'

"The District Court, having awarded a judgment in favor of Lushbough in his action against the United States, could not in the face of the explicit provisions of the Act order judgment against Hoffman in favor of Lushbough in the same action. Prechtl v. United States, D. D. 84 F. Supp. 889, 890; Lauterbach v. United States, D. C. 95 F. Supp. 479, 482. *Nor is there any showing in the evidence of the necessary diversity of citizenship as between Lushbough and Hoffman.* Since the reversal of the judgment against the United States carries with it the reversal of the judgment for the United States against Hoffman, it is unnecessary to consider Hoffman's contention that the United States could not implead Hoffman as a third-party defendant in the action." (Emphasis added.)

In *Kenrose Manufacturing Co. v. Fred Whitaker Co., supra,* the United States Court of Appeals for the Fourth Circuit set forth the majority view on the subject, stating:

"Rule 14 of the Federal Rules of Civil Procedure governs third-party practice and it has indeed been held under that rule that, where there is diversity as between plaintiff and defendant, defendant may implead a third party of the same citizenship as the plaintiff. In such case, it may be said that ancillary jurisdiction confers power upon the court over the third-party action.

"Rule 14 also contains language permitting a plaintiff to

> Assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

There is, however, no indication in the rule whether a basis of jurisdiction independent of the main action must be alleged to support plaintiff's claim against the third-party defendant. Where jurisdiction does not otherwise appear, mere permission, in the rules, to assert a claim, does not itself confer jurisdiction over that claim. By express provision the rules are not to be read as a source of jurisdiction. See Rule 82. To illuminate this point, we must necessarily look elsewhere.

"Many courts have considered whether an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. With impressive consistency the overwhelming majority has held an independent jurisdictional basis to be a prerequisite to the maintenance of such a claim. See, e. g., Stemler v. Burke, 344 F. 2d 393, 395-396 (6th Cir. 1965); McPherson v. Hoffman, 275 F. 2d 466, 470 (6th Cir. 1960); Patton v. B & O R. R. Co., 197 F. 2d 732, 743 (3rd Cir. 1952); *United States v. Lushbough,* 200 F. 2d 717, 721-722 (8th Cir. 1952); Friend v. Middle Atlantic Transportation Co., 153 F. 2d 778, 779-780 (2nd Cir.), cert. denied, 328 U. S. 865, 66 S. Ct. 1370, 90 L. Ed. 2d 1635 (1946); Corbi v.

United States, 298 F. Supp. 521 (D. C. Pa. 1969); Palumbo v. W. Md. Ry. Co., 271 F. Supp. 361 (D. C. Md. 1967).

"Several supporting reasons have been advanced by courts holding the majority view on this question. Among them are that: (1) plaintiff should not be allowed, by an indirect route, to sue a co-citizen under diversity jurisdiction when he is not permitted to sue that party directly; (2) the majority rule prevents collusion between plaintiff and defendant to obtain federal jurisdiction over a party who would otherwise not be within the court's reach; (3) the rule which generally does not require diversity as between plaintiff and third-party defendant proceeds on the assumption that the plaintiff is seeking no relief against the third-party defendant; and (4) federal dockets are so overcrowded that the federal courts should not reach out for state law based litigation." (Emphasis added.)

Even Judge Van Pelt acknowledged the ruling of the majority, yet for some reason failed to follow it. He stated:

"A number of courts have been impressed with the fact that by not requiring diversity, the plaintiff could assert a claim against a party whom he could not have sued directly in the federal courts without independent jurisdictional grounds. David Crystal, Inc. v. Cunard S. S. Co., 223 F. Supp. 273 (S. D. N. Y. 1963); LaChance v. Service Trucking Co., 208 F. Supp. 656 (D. Maryland 1962); Pasternack v. Dalo, 17 F. R. D. 420 (W. D. Pa. 1955); Welder v. Washington Temperance Ass'n, 16 F. R. D. 18 (D. Minn. 1954); (Dictum) *United States v. Lushbough,* 200 F. 2d 717, 721 (8th Cir. 1952); Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305 (E. D. N. Y. 1941). The same decisions express the danger of collusion between the original parties thereby enabling a plaintiff to assert a claim against a co-citizen in the federal courts through the use of third party practice." (Emphasis added.)

The trial court in its Memorandum addressed to the petitioner's motion to dismiss for lack of subject matter jurisdiction (A. 54), stated that the rule that an independent basis of jurisdiction need not exist in order for the plaintiff to assert a claim against a third-party defendant was once a minority view, but that the trial court believed it to be correct.

Petitioner emphasizes that this still clearly remains the minority view. No court of appeals in any circuit in the Federal Judicial System has ever followed the minority view, and, in fact, those addressing the issue have criticized and dismissed the minority view as being contrary to the intent and purpose of the Federal Rules and certainly, contrary to the comments of the Advisory Committee concerning Rule 14.

Judge Bright, in his dissent emphasizes that this is still a minority rule. His comments were as follows:

"As Judge Smith correctly observes, *supra* at 12 and 14 n. 25, citing *Fawvor v. Texaco, Inc., supra,* 512 F. 2d 890, the majority of federal courts support the view that an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. It also appears that we are the first court of appeals to rule to the contrary. In addition to the cases cited by the majority, see *Saalfrank v. O'Daniel,* 533 F. 2d 325 (6th Cir.), *cert. denied sub. nom. Saalfrank v. Parkview Mem. Hosp.,* 429 U. S. 922 (1976); *Rosario v. American Export-Isbrandtsen Lines, Inc.,* 531 F. 2d 1227, 1233 and n. 17 (3d Cir.), *cert. denied sub. nom. Rosario v. United States,* 429 U. S. 857 (1976). Thus, I would conclude that Congress did not intend that federal courts take

jurisdiction over a plaintiff's claim against a third-party defendant, in the absence of independent jurisdictional grounds."

In *Aldinger v. Howard*, 96 S. Ct. 2413 (1976), this Court addressed the question of whether a plaintiff who asserted a claim against one defendant could implead a different defendant on a state law claim where there is no independent basis of federal jurisdiction, merely because the claim of the plaintiff against both defendants "derived from a common nucleus of operative fact."

In an opinion by Mr. Justice Renquist, this Court stated:

"The situation with respect to the impleading of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. *But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derive from a common nucleus of operative fact.' Ibid.* True, the same considerations of judicial economy would be served insofar as plaintiff's claims 'are such that he would ordinarily be expected to try them all in one judicial proceeding . . . ' Ibid. *But the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.* We think there is much sense in the observation of Judge Sobeloff, writing for the Court of Appeals in *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.*, 512 F. 2d 890, 894 (C. A. 4, 1972):

"'The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence of absence of jurisdiction. Especially is this true where as here the efficiency plaintiff seeks so avidly is available without question in the state courts.'" (Emphasis added.)

This Court quoted with approval the language of Judge Sobeloff in *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.*, supra. That case was cited extensively by appellant in its original brief filed herein. This Court emphasized that "the addition of a completely new party would run counter to the well-established principle that federal courts as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by the Congress." In the words of Judge Sobeloff in the *Kenrose Mfg. Co., Inc.* case, "the efficiency the plaintiff seeks so avidly is available without question in the state courts."

Aldinger holds that where jurisdiction is based not on diversity of citizenship but on a federal statute otherwise conferring jurisdiction over the subject matter, a claim based on state law against an entirely different defendant over which there is no independent basis of federal jurisdiction will only be allowed where the Court satisfies itself (1) that Art. III of the United States Constitution permits it and (2) that "Congress in the

statutes conferring jurisdiction has not expressly or by implication negated its existence." But jurisdiction does not exist in a factual situation such as that which is before the Court in the instant matter. It is stated in *Aldinger*:

> "From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of the state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derived from a common nucleus of operative fact.' "

This Court then emphasized:

> "That the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress."

This is especially so where the plaintiff may seek his remedy in the state court. In the instant matter, respondent's remedy was available in the state court. There was no jurisdiction.

In the case of *Fawvor v. Texaco, Inc.*, 546 F. 2d 636 (5th Cir. 1977) the Fifth Circuit Court of Appeals construed the case of *Aldinger v. Howard,* supra. Relying on that decision plus the decision of the Fourth Circuit in

Kenrose Manufacturing Company, Inc. v. Fred Whitaker Co., Inc., supra, the court stated:

> "The authorities and cases cited above convince this Court that an independent ground of jurisdiction is necessary in order to support plaintiff's claim against the third-party defendant. No questions of federal law are involved in either the original action or in plaintiff's action against the third-party defendant. The basis of jurisdiction in the original complaint is diversity, but no diversity exists between the plaintiff and the third-party defendant. Neither is there any other basis for the federal court's assertion of jurisdiction over plaintiff's direct claim against the third-party defendant. This is not a situation where the same plaintiff and defendant seek to join a state claim with a federal claim. Although it is true that the defendant-third-party plaintiff has already brought in the third-party defendant, the defendant-third-party plaintiff had no choice as to forum, and neither did the third-party defendant. Not only did plaintiff have its choice of forum, but in fact it could and did file the same action in state court. The Constitution, statutes, rules of procedure, judicial precedent and public policy dictate that this Court not broaden the jurisdiction of the federal courts any more than that clearly permitted by law. Therefore, this Court concludes that an independent basis of jurisdiction is necessary for a plaintiff in a diversity action to assert a non-federal claim against a non-diverse third-party defendant."

Other district courts sitting in the Eighth Circuit have chosen to follow the majority rule. For example, in *Welder v. Washington Temperance Association,* 16 F. R. D. 18 (1954), the United States District Court for the District of Minnesota, Second Division, stated:

> "The interpleading of the third-party defendant brought in the plaintiff's amended complaint places

residents of Minnesota on both sides of the case, thereby destroying the basis of this court's jurisdiction.

"Rule 14 of the Federal Rules of Civil Procedure, 28 U. S. C. A., was intended to avoid delay and multiplicity of actions and should be liberally construed, but not to the extent of permitting such construction to extend the jurisdiction of the court. What plaintiff proposed to accomplish by his amended complaint was in effect to substitute another cause of action for that originally commenced by him. This he cannot do."

IV.

Dismissal of all federal claims before trial requires dismissal of state claims as well.

United Mine Workers of America v. Gibbs, 383 U. S. 715 (1966).

Kenrose Manufacturing Co. v. Fred Whitaker Co., 53 F. R. D. 491 (1971).

Municipal Leasing System, Inc. v. Northampton National Bank of Easton, 382 F. Supp. 968 (1974).

Andrews v. Central Surety Insurance Company, 295 F. Supp. 1223 (1969).

Gibson v. First Federal Savings and Loan Association of Detroit, 504 F. 2d 826 (1974).

Kurtz v. State of Michigan, 548 F. 2d 172 (6th Cir. 1977).

Hodge v. Mountain State Tel. & Tel. Co., 555 F. 2d 254 (9th Cir. 1977).

But even if it be assumed that the minority view is correct, the jurisdictional limit of a federal district court had never been extended to that which it has in the present action. The trial court acknowledged that:

> "This case is nevertheless novel, in that the third-party plaintiff was dismissed." (A. 56)

The holding of the trial court in this matter is likewise novel in finding that jurisdiction existed between citizens of the same state in the Federal Court, where no federal question was presented and the main cause of action between plaintiff and defendant, OPPD, had been dismissed prior to trial at defendant's request. Prior to the trial court's decision, jurisdiction has never been allowed to exist in a similar situation. The trial court stated:

> "However, having determined that ancillary jurisdiction exists, it is only equitable that the court now retain jurisdiction of this 'pendent' claim." (A. 56)

In *Kenrose Manufacturing Co. v. Fred Whitaker Co.*, 53 F. R. D. 491 (1971), the plaintiff attempted to make a claim against the third party defendant. The Court stated:

> "This court agrees with the majority view that when plaintiff amends his complaint to assert a direct claim against a third-party defendant of the same citizenship as plaintiff, there no longer exists diversity with regard to the main action. Furthermore, this court feels that diversity existing between an original plaintiff and a defendant is required to support any claims based on ancillary jurisdiction. Since that diversity was destroyed when the plaintiff amended his complaint to assert a claim against a co-citizen there no longer exists a basis for utilizing ancillary jurisdiction."

The Court in *Kenrose* then emphasized the distinction between the case which was before it and the cases following the minority views stating:

"*Furthermore, in the case at bar, the third-party plaintiff has voluntarily moved to dismiss his third-party complaint against Kilodyne. This court is of the opinion that this factor distinguishes this case from the cases following the minority view, in that, in those cases the third-party complaint was not withdrawn but remained in the action.* By analogy, this court finds that the principle laid down in the case of State of Maryland to Use and Ben. of Wood v. Robinson, 74 F. Supp. 279 (D. Md., 1947), applies to the case at bar. *Robinson,* supra, involved an action by Virginia plaintiffs and the Maryland defendant, parties to the main action, settled their dispute out of court. Afterwards, the third-party defendants filed a motion to dismiss the third-party complaint for lack of diversity of jurisdiction. The Court, in granting that motion, rejected the general proposition that once jurisdiction properly attaches, it will not ordinarily be defeated by changes in situation.

"In the case at bar, this Court feels that the same principles should apply. *Since the third-party plaintiff has voluntarily moved for a dismissal of its claim against the third-party defendant, and that motion has been granted, the basis for allowing a direct complaint by the plaintiffs against Kilodyne, without an independent basis of jurisdiction, no longer exists.* That third-party complaint was the only foundation upon which the plaintiff could, relying on the minority view, support his claim that no independent basis of jurisdiction is necessary. For the above reasons, this Court feels that it is without jurisdiction to decide the plaintiff's amended complaint against Kilodyne, Inc." (Emphasis added.)

In the case of *Municipal Leasing System, Inc. v. Northampton National Bank of Easton,* 382 F. Supp. 968 (1974), the United States District Court for the Eastern District of Pennsylvania, Judge VanArtsdalen stated:

"Count IV 'alleges liability and seeks relief pursuant to the ancillary jurisdiction' of the court. In plaintiff's brief, it is conceded that this count, depending on ancillary jurisdiction is only maintainable if there is some independent basis for federal jurisdiction arising out of one or more of the other counts. The count apparently charges that the defendant bank improperly made charges against plaintiff's bank account, refused to honor certain checks drawn against the account and in other ways 'mishandled' plaintiff's bank account. This is purely a matter for state court determination. There being no diversity jurisdictional basis, *and in view of the dismissal of all other counts,* **this cause of action must likewise fail."** (Emphasis added.)

In the case of *Andrews v. Central Surety Insurance Company,* 295 F. Supp. 1223 (1969), the United States District Court for the District of South Carolina, Judge Simons, stated:

"The ancillary jurisdiction of the federal courts recognized by the foregoing authorities would not extend to a situation *where the main suit had been fully concluded and there were no assets actually or constructively within the court's possession and control as a result of the principal suit.* Such was the case in Bounougias v. Peters, 369 F. 2d 247 (7th Cir. 1966). In that case the original tort action filed and tried in the federal district court in connection with Bounougias' injuries had been completely terminated and its judgment satisfied and all funds distributed before the attorney's suit for his fee was commenced. The court held under such circumstances that the district court had no jurisdiction since 'the district court had no property connected with this litigation in its custody or control.'" (Emphasis added.)

In denying Petitioner's motion for dismissal on the basis of lack of subject matter jurisdiction, the trial court

also relied on the case of *United Mine Workers of America v. Gibbs,* 86 S. Ct. 1130, 383 U. S. 715 (1966). The trial court quoted from Moore's Federal Practice, stating:

> "Properly read, *United Mine Workers* [*v. Gibbs,* 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case,* i. e., all claims, state or federal, which derive from a common nucleus of operative facts. . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27[1], 14-569 to 14-570."

However, in *Gibbs* this Court was dealing with pendent jurisdiction and not with the question of ancillary jurisdiction.

In the case of *Saalfrank v. O'Daniel,* 553 F. 2d 325 (6th Cir. 1976) Judge Lively, writing on behalf of the 6th Circuit stated:

> "Strictly speaking, a case such as the present one involves ancillary, rather than pendent jurisdiction. See *Wright,* Law of Federal Courts (2nd Ed.) at 65. *Mineworkers v. Gibbs,* supra, was concerned with pendent jurisdiction only. The Supreme Court does not appear to have decided whether the doctrine of ancillary jurisdiction empowers a federal court to decide a direct claim by a plaintiff against a non-diverse third-party defendant in the absence of an independent jurisdictional basis."

But the approach of this Court in *Gibbs* is indeed pertinent to the plea of the petitioner in this action. It is true that in *Gibbs* this Court stated that if the federal and state claims "derive from a common nucleus of operative fact"; if the plaintiff would ordinarily be expected to try all of his claims in one judicial proceeding; and, if the federal issues are substantial in character, then there is power in the federal court to hear all such claims. The *Gibbs* opinion indicated, however, that such power is not required to be exercised in every case even though it is found to be in existence. Therefore, pendent jurisdiction is a "doctrine of discretion not of plaintiff's right." This Court then stated:

> "Its justification lies in considerations of judicial economy, convenience, and fairness to litigants; if these are not present, a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply State law to them, *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, but procuring for them a surer-footed reading of applicable law. *Certainly, if the Federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."* (Emphasis added.)

This statement has been consistently construed to limit the discretion of the district court.

In the recent case of *Gibson v. First Federal Savings & Loan Association of Detroit,* 504 F. 2d 826 (1974), the United States Court of Appeals for the Sixth Circuit rigidly applied this Supreme Court mandate. The Court stated therein:

> "In the absence of a substantial federal claim related to asserted state claims in such a way that the entire case may properly be deemed one 'case', federal courts do not have jurisdiction over purely state claims. *United Mine Workers of America v. Gibbs,*

383 U. S. 715, 725, 86 S. Ct. 59, 15 L. Ed. 2d 58 (1966). *Dismissal of all federal claims before trial requires dismissal of state claims as well. Id* at 726, 86 S. Ct. 59. A state court is the proper forum for adjudication of issues of general law, particularly where questions of fiduciary relationships are involved." (Emphasis added.)

See also *Kurtz v. State of Michigan,* 548 F. 2d 172 (6th Cir. 1977) wherein the Court stated:

> "Since all portions of the claims in this cause of action which arise under federal law have now been dismissed, the state law claims are no longer pendent and must be dismissed likewise. See *United Mine Workers v. Gibbs* . . ."

and, *Hodge v. Mountain States Tel. & Tel. Co.,* 555 F. 2d 254 (9th Cir. 1977), wherein the Ninth Circuit Court stated:

> "When a district court dismisses all federal claims prior to trial, it should not retain jurisdiction over pendent state claims."

The Eighth Circuit, however, claims dismissal of the federal claims prior to trial "is but one factor, among many others, to be considered" by the Court in exercising its discretion to retain jurisdiction of state law claims.

If, as the Court in *Kenrose* stated, the dismissal prior to trial of the defendant with whom an independent basis of jurisdiction existed, does distinguish those cases following the minority view from those adhering to the majority view, it is then of great import to note that the Defendant OPPD was not dismissed from this action until October 1, 1975 (A. 41), after the statute of limitations had run. Petitioner certainly could not control the dismissal of the

defendant OPPD by the trial court and could not insist that OPPD be dismissed prior to the running of the statute of limitations, so that it could assert its claim that no independent basis of jurisdiction existed between respondent and petitioner based on the distinction of *Kenrose.*

CONCLUSION

Subject matter jurisdiction does not exist in this case. The petitioner and respondent are both citizens of the State of Iowa and thus there is no diversity of citizenship between the parties. An independent basis of jurisdiction is required to support a claim by a plaintiff against a third-party defendant, especially where all federal claims are dismissed from an action before trial so should all state claims be dismissed from an action. The only non-diverse defendant, OPPD, was dismissed prior to trial leaving an Iowa plaintiff to litigate a state law claim against an Iowa defendant.

Jurisdiction cannot be created by waiver, estoppel, consent, stipulation or discretion. *United Mine Workers v. Gibbs,* supra, does not touch ancillary jurisdiction, but rather deals with pendent jurisdiction and did not provide the trial court with the power it needed to render a judgment in this matter. Nor did the conduct of the petitioner estop it from asserting lack of subject matter jurisdiction. The petitioner did nothing other than answer in conformance with the provisions of Rule 8 of the Federal Rules of Civil Procedure. The respondent had access to information equal to that of the petitioner at early stages of

the proceeding which would have advised respondent of petitioner's principal place of business.

The respondent never directed interrogatories to the defendant until June 17, 1974, after the statute of limitations had run; and, even in those interrogatories, respondent failed to ask petitioner its principal place of business. The burden of proving the existence of diversity of citizenship and therefore subject matter jurisdiction was on respondent. Respondent was the one attempting to exert the existence of federal jurisdiction. In light of the rule that there is a presumption against the existence of federal jurisdiction, respondent was ladened with an even greater burden of proof in that regard. Yet, the respondent failed to come forward with evidence to satisfy that burden.

Petitioner therefore respectfully requests that this court find that the trial court did not have the power to hear this matter since subject matter jurisdiction did not exist and reverse the judgment of the circuit court and dismiss for lack of jurisdiction.

Respectfully submitted,

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